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No. 91-2070

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

PEGGY STEENBERGEN, Individually and on Behalf of the Estate of JOSEPH RAY STEENBERGEN, Deceased; and JANET STEENBERGEN as Next Friend of JULIE ANN STEENBERGEN and JENNIFER JO STEENBERGEN, Minors,

*Petitioners,*

v.

FORD MOTOR COMPANY,

*Respondent.*

**Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fifth District Of Texas**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Plaintiffs waived their equal protection argument by failing to properly raise it in the Texas Supreme Court.

2. Whether Plaintiffs' argument that they were unable to afford daily trial transcript has any factual support in the record.

3. Whether non-indigent litigants in civil cases have a constitutional right to use – free of charge – all of the litigation tools used by their adversaries, merely because the lawyer asserting that right claims that his clients cannot afford to pay for them.

4. Whether Plaintiffs suffered any legally cognizable prejudice from Defendant's use of daily transcript to truthfully show what occurred earlier in the month-long trial.

## RULE 29.1 STATEMENT

The subsidiaries of Ford Motor Company required to be disclosed under Supreme Court Rule 29.1 are listed in Appendix B.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

RULE 29.1 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 3

I. PLAINTIFFS WAIVED THEIR EQUAL PROTECTION ARGUMENT BY NOT PROPERLY RAISING IT IN THE TEXAS SUPREME COURT .. 3

II. PLAINTIFFS' EQUAL PROTECTION ARGUMENT IS ENTIRELY LACKING IN ANY FACTUAL SUPPORT ..... 4

III. PLAINTIFFS' EQUAL PROTECTION ARGUMENT IS ENTIRELY LACKING IN ANY LEGAL SUPPORT ..... 5

IV. PLAINTIFFS SUFFERED NO COGNIZABLE PREJUDICE FROM THE TRUTH ..... 6

CONCLUSION ..... 7

# TABLE OF AUTHORITIES

Page

CASES

*Beck v. Washington*, 369 U.S. 541 (1962) ..... 3

*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) ..... 6

*McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964) ..... 3

*Morrison v. Chan*, 699 S.W.2d 205 (Tex. 1985) ..... 4

*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) ..... 4

*Ross v. Moffitt*, 417 U.S. 600 (1974) ..... 6

*United States v. Bari*, 750 F.2d 1169 (2nd Cir. 1984), *cert. denied* 472 U.S. 1019 (1985) ..... 5

*United States v. Sliker*, 751 F.2d 477 (2d Cir. 1984), *cert. denied* 470 U.S. 1058 and *cert. denied* 471 U.S. 1137 (1985) ..... 5

*Walle v. Sigler*, 456 F.2d 1153 (8th Cir. 1972) ..... 6

Respondent Ford Motor Company ("Ford") respectfully requests that this Court deny the petition for a writ of certiorari by which Plaintiffs seek review of a decision of the Texas Court of Appeals.

## STATEMENT OF THE CASE

This is a product liability/wrongful death case brought under Texas law. Plaintiffs' principal allegation was that the 1982 Ford LTD in which their decedent was injured – and more than 100 million other vehicles made by every automobile manufacturer in the world – were defectively designed because they were equipped with standard lap/shoulder seat belts rather than with automatic seat belts or airbags. A jury rejected this claim, the Texas Court of Appeals affirmed, and the Texas Supreme Court denied Plaintiffs' application for a writ of error.

This was the first case involving such allegations to be tried. It was tried by a plaintiff's lawyer, Windle Turley, known nationally for his expertise in product litigation. Because of the significance of this case to Ford, to the automotive industry, and to society generally, Ford arranged to have daily trial transcript prepared for its use in defending against Plaintiffs' allegations. Ford wanted to hire a private court reporter to prepare the daily transcript, but the trial court refused to allow that. (S.F. V, 619-1) Instead, the trial court's regular court reporter alternated shifts during the day with one other official court reporter and one free-lance reporter.

The trial court explained its reasons for refusing to allow Ford to hire a private reporter: (1) The presence of

only one reporter in the courtroom at a time would avoid confusion and congestion; (2) the additional reporters needed to prepare the daily transcript would relieve the trial court's regular court reporter from the obligation of recording and transcribing all of the testimony taken all day, every day in the month-long trial; and (3) relieving the regular court reporter would allow for a more accurate transcription of the record. In addition, the official court reporters were more familiar with the court's operation than free-lance reporters. (S.F. V, 617-1-618-1, 623-1; S.F. VI, 760, 786)

The trial court offered Plaintiffs' counsel equal access to the daily transcript on terms to be negotiated with the court reporter. (S.F. V, 620-1; S.F. VI, 758-59, 761) Plaintiffs' counsel claimed that his clients could not afford daily transcript, but he offered no testimony or evidence of any kind to support that claim. (S.F. V, 620-1, 759) The trial court observed that Plaintiffs had the right to file affidavits to support their claim (S.F. V, 621-1), but Plaintiffs elected not to do so.

The trial court also invited Plaintiffs' counsel to tape record the proceedings if he so desired. (S.F. VI, 761) Plaintiffs' counsel apparently elected not to do so.

During the trial, Ford offered at least once to allow Plaintiffs' counsel to "look through [the relevant volume of the daily transcript] as much as you like." (S.F. VIII, 1189) Plaintiffs' counsel apparently declined. There is no record that Plaintiffs' counsel ever requested, or ever was denied, a reasonable opportunity to examine any portion of the daily transcript.

No tax funds were used to pay for the daily transcript. (S.F. VI, 784) The "state property" which Plaintiffs assert was used to prepare the daily transcript was merely space in the court reporter's office. (S.F. VI, 784-85) Plaintiffs (but not Ford) had been given space in the courthouse to store materials. (S.F. VI, 757)

## REASONS FOR DENYING THE WRIT

### I.

### PLAINTIFFS WAIVED THEIR EQUAL PROTECTION ARGUMENT BY NOT PROPERLY RAISING IT IN THE TEXAS SUPREME COURT

The Texas Court of Appeals rejected Plaintiffs' argument based on the equal protection clause of the United States Constitution. Plaintiffs, however, did not raise that argument, or any argument based on the United States Constitution, in their application for a writ of error filed with the Texas Supreme Court. (The Points of Error which Plaintiffs raised in the Texas Supreme Court are reproduced in full in Appendix A.) Accordingly, Plaintiffs waived their constitutional arguments as a matter of Texas law. *E.g. McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex. 1964) (points not raised in application for writ of error are deemed waived). Therefore, that argument is not properly before this Court. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-553 (1962).[1]

[1] Plaintiffs belatedly renewed their due process and equal protection arguments in a motion for rehearing filed in the

(Continued on following page)

## II.

## PLAINTIFFS' EQUAL PROTECTION ARGUMENT IS ENTIRELY LACKING IN ANY FACTUAL SUPPORT

Plaintiffs' equal protection argument is premised on their lawyer's claim that his clients were unable to afford portions of the daily trial transcript. But Plaintiffs made no attempt to show, by affidavit or otherwise, either (1) the cost of those portions of the daily transcript that they purportedly needed or (2) their inability to pay that cost.

What the record does show is that Plaintiffs and their attorneys have been able to afford the cost of litigating a major product liability case through three and a half years of pretrial proceedings, through a month-long trial, through an appeal to the Texas Court of Appeals and an application for writ of error in the Texas Supreme Court, and through a certiorari petition to this Court. They and their attorneys have been able to afford out-of-state experts, high-tech computer simulations, numerous depositions, extensive discovery, laser-disc video equipment more sophisticated and costly than anything used by Ford, dozens of large blowups of numerous exhibits, and numerous charts and graphics. (E.g. PX 295; Ex. Vol. VI, 2178, 2182; S.F. III, 417; S.F. V, 564-1-565-1, 574-1-575-1, 637) In short, Plaintiffs have been, and still are, able to afford everything else they needed throughout five years

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Texas Supreme Court. However, this was insufficient to preserve the issue under either state or federal law. *E.g. Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *Morrison v. Chan*, 699 S.W.2d 205, 206-207 (Tex. 1985).

of litigation – except, they would have this Court believe, a portion of the cost of a daily trial transcript.

Further, Texas lawyers are permitted to, and commonly do, advance the costs of litigation and make repayment of those costs contingent on a recovery. Texas Disciplinary Rule of Professional Conduct 1.08(d)(1). In this very case, the evidence shows that it was Plaintiffs' lawyers, not Plaintiffs themselves, who were paying the fees of Plaintiffs' experts. (S.F. III, 417; S.F. V, 564-1- 565-1) Plaintiffs have not asserted that their nationally recognized law firm was unable to advance the costs of necessary portions of daily transcripts, just as it advanced or paid the experts' fees and just as it has surely advanced other litigation costs – such as the cost of printing their certiorari petition.

## III.

## PLAINTIFFS' EQUAL PROTECTION ARGUMENT IS ENTIRELY LACKING IN ANY LEGAL SUPPORT

Plaintiffs' argument also lacks legal support. The only case they cite that involves daily transcript concerned an *indigent* defendant in a *criminal* case. *United States v. Bari*, 750 F.2d 1169, 1181-82 (2nd Cir. 1984), *cert. denied* 472 U.S. 1019 (1985). This case is not a criminal case, and Plaintiffs have never alleged that they are indigent.

Further, under *Bari*, even an indigent defendant in a criminal case is not entitled to daily transcript where the trial court offers "other means" to substitute for daily transcript – as the trial court in this case invited use of a tape recorder. *United States v. Sliker*, 751 F.2d 477, 489-492

(2d Cir. 1984), *cert. denied* 470 U.S. 1058, and *cert. denied* 471 U.S. 1137 (1985). *See also Walle v. Sigler*, 456 F.2d 1153, 1156 (8th Cir. 1972) (indigent defendant in a criminal case does not have a constitutional right to daily transcript). This Court has expressly held that even an indigent defendant in a criminal case does not have a constitutional right to all of the advantages enjoyed by other defendants. *See Ross v. Moffitt*, 417 U.S. 600 (1974) (indigent defendant in a criminal case did *not* have a right to counsel on appeal to the North Carolina Supreme Court).

Further, a party in a civil case does not necessarily even have a constitutional right to a lawyer, let alone a constitutional right to free use of all of the litigation tools his adversary might use. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). In fact, if the rule were as Plaintiffs in this case contend, any plaintiff in any civil case could prevent defendants from hiring experts, using video equipment, preparing exhibits, or using any other tool of litigation merely by *claiming* that the plaintiff was unable to afford that tool.

## IV.

## PLAINTIFFS SUFFERED NO COGNIZABLE PREJUDICE FROM THE TRUTH

As the trial court correctly recognized, the presence of two additional court reporters at Ford's expense was a significant benefit to the trial court and to the parties. These reporters were able to relieve the trial court's own reporter during the course of a month-long trial, so that three reporters, not just one, shared responsibility for preparing the official transcript. Thus, the quality of the

transcript, and therefore the quality of justice, was improved. (S.F. V., 617-1-618-1) Further, the availability of daily transcript allowed the judge to rule more intelligently on disputes that arose during trial, because he was able to determine accurately what had transpired days or weeks earlier, without having to rely on the imperfect memories of the court and counsel.

In contrast, Plaintiffs have failed to demonstrate any legally cognizable prejudice. All Plaintiffs have done is cite portions of the proceedings where Ford used the daily transcript to *truthfully* show what had occurred earlier in the month-long trial. (S.F. VIII, 1190-92; S.F. IX, 1551-53; S.F. X, 1785) Ford's use of the transcript in this fashion cannot constitute prejudice requiring reversal, because Plaintiffs had no legal or constitutional right to take advantage of their own counsel's or their own expert's misrepresentations – whether innocent or intentional – of prior testimony or proceedings.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX A

## POINTS OF ERROR RAISED IN PETITIONERS' APPLICATION FOR WRIT OF ERROR FILED IN TEXAS SUPREME COURT

POINTS OF ERROR

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DOCUMENTS PRODUCED BY FORD IN RESPONSE TO PETITIONERS' REQUEST FOR PRODUCTION WERE KEPT IN FORD'S "READING ROOM" IN THE USUAL COURSE OF ITS BUSINESS. (Germane to First Point in Motion for Rehearing).

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS FAILED TO SEEK TO ORGANIZE OR LABEL THE REQUESTED DOCUMENTS INTO CATEGORIES. (Germane to Second Point in Motion for Rehearing).

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT FORD PROPERLY OR SUFFICIENTLY SPECIFIED THE RECORDS FROM WHICH THE INFORMATION SOUGHT IN PETITIONERS' REQUEST FOR PRODUCTION COULD BE OBTAINED. (Germane to Fourth Point in Motion for Rehearing).

IV.

THE COURT ERRED IN HOLDING THAT FORD WAS PROPERLY ALLOWED TO INTRODUCE EVIDENCE WHICH IT NEITHER PROVIDED NOR SUPPLEMENTED IN RESPONSE TO APPELLANTS' REQUEST FOR PRODUCTION. (Germane to Fifth Point in Motion for Rehearing).

V.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT CORRECTLY EXCLUDED DOCUMENTS THAT WERE PRODUCED BY FORD IN RESPONSE TO PETITIONERS' REQUEST FOR PRODUCTION, SINCE THE FACT THAT THE DOCUMENTS WERE FOUND IN FORD'S POSSESSION WAS ENOUGH TO AUTHENTICATE THEM. (Germane to Sixth Point in Motion for Rehearing).

VI.

THE COURT OF APPEALS ERRED IN HOLDING THAT DOCUMENTS PRODUCED BY FORD WERE CUMULATIVE OF OTHER EVIDENCE ADMITTED DURING THE TRIAL. (Germane to Seventh Point in Motion for Rehearing).

VII.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF CRASH TEST DATA OBTAINED

BY PETITIONERS' EXPERT WITNESS IN OTHER CASES INVOLVING FORD, WHERE THE DOCUMENTS WERE SHOWN TO HAVE DISTINCTIVE CHARACTERISTICS SUFFICIENT TO RAISE A FACT ISSUE AS TO THEIR GENUINENESS. (Germane to Eighth Point in Motion for Rehearing).

VIII.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN ALLOWING FORD TO OBTAIN DAILY TRANSCRIPTS OF THE TESTIMONY; THE TRIAL COURT'S ACTION VIOLATED ART. 16, SEC. 6 OF THE TEXAS CONSTITUTION, WHICH PROHIBITS THE EXPENDITURE OF PUBLIC FUNDS FOR PRIVATE PURPOSES, AS WELL AS ART. 1, SEC. 3 OF THE TEXAS CONSTITUTION. (Germane to Ninth Point in Motion for Rehearing).

IX.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION IN ASSESSING PART OF THE COURT COSTS AGAINST NORTH RIVER INSURANCE COMPANY. (Germane to Tenth Point in Motion for Rehearing).

## APPENDIX B

## RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

Autolatina America, Inc.
Dobco Life Insurance Company
Ford Holdings
The Hertz Corporation

Argentina

- Autolatina Argentina S.A. de Ahorro Para Fines Determinados
- Invercred Compania Financiera S.A.
- Transax Socieded Anonima, Comercial, Industrial y Financiera
- Volkswagen Inversiones S.A.
- Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

- Australian Road Credit Limited
- Foral Service Proprietary Limited
- Ford Motor Company of Australia Limited
- Ford Sales Company of Australia Limited

Belgium

- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil

Apolo Administradora de Bens S/C Ltda.
Autolatina Brasil S.A.
Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda
Autolatina Financiadora S.A. – Credito, Financiamento e Inves
Autolatina Leasing S/A – Arrandamento Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribudora de Productos de Petroleo Ltda.
Fundacao Autolatina
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Volkswagen Factoring Fomento Comercial S/A

Canada

Ford Motor Company of Canada, Limited

Denmark

Ford Credit A/S
Ford Motor Company A/S

England

A C Cars Limited
Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited

Aston Martin Lagonda Limited
Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Lagonda Properties Limited

Finland

Oy FORD Ab
Oy Ford Credit Rahoitus

Holland

Ford Nederland B.V.

Japan

Japan Climate Systems Corporation *CCD*

Mexico

Altec Electronica Chihuahua, S.A. de C.V. *ED*

Netherlands

Ford Credit B.V.

Norway

Ford Motor Norge A.S.

Singapore

Ford Motor Company Private Limited

Spain

Ford Credit S.A.

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag
Ford Vagnskadegaranti AB

Switzerland

Ford Credit S.A.
Ford Motor Company (Switzerland) S.A.

Taiwan

Ford Taiwan Services, Limited

Venezuela

Ford Motor Credit S.A.